NO. 47800-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JUSTIN DAVIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry T. Costello

No. 15-1-00143-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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2. Has defendant raised a meritless challenge to his offender score when no part of it was derived from the out-of-state conviction he identifies as lacking proof of comparability?

3. Is defendant incapable of proving the trial court imposed unconstitutionally vague conditions of community custody through notations in the judgment that alerted him to the statutory authority of his Community Corrections Officer?

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B. STATEMENT OF THE CASE.

1. Procedure

Defendant fired his appointed counsel and proceeded to jury trial *pro se*, charged by Amended Information with drive-by shooting, three counts of firearm enhanced first degree assault, unlawful possession of a firearm and witness tampering. RP(3/10) 11, 16; RP(3/25) 12-19; CP 51-53. Standby counsel was assigned. RP (3/25) 13-14. The Honorable Jack Nevin presided over defendant's trial. RP (6/8) 3. Testimony commenced June 11, 2015. RP(6/11) 18. Thirteen witnesses testified over four days. CP 130.[1] Physical evidence was adduced through 43 exhibits. CP 124-29. Trial was interrupted mid-witness by defendant's challenged guilty plea to the Second Amended Information, which reduced the charges to drive-by shooting and unlawful possession of a firearm in the first degree. RP(6/17) 21-24. The mandatory $200 criminal filing fee was part of the agreement. CP 62; RP(6/17) 26-28. The plea was accepted by the judge who presided over trial. RP(6/17) 29-30. Defendant stipulated to a Louisiana conviction *excluded* from his offender score. CP 70-72.

Sentence was imposed June 24, 2015. CP73. Defendant moved to withdraw his plea. RP(6/24)36. The stated basis was: (i) he changed his mind about the appellate rights he waived, (ii) purported hearsay admitted at trial, (iii) alleged dishonesty by unnamed witnesses, and (iv) the State's

[1] CP above 123 reflect State's estimate of supplemental designations.

alleged failure to "pursue" people who robbed him. RP(6/24) 36-40. He did not challenge the factual basis for the plea in his oral motion or the written motion to dismiss filed that day. *Id.*; CP 87-92. The motion was denied. RP(6/24) 39. A 70 month prison sentence was imposed, which was eight months less than mid-range. CP 76, 79. The mandatory $200 criminal filing fee was imposed without objection. CP 77; RP(6/24) 34, 40, 42. Statutory conditions of community custody were referenced in the judgment. CP 85. A notice of appeal was timely filed. CP 106.

2. Facts

This evidence was adduced at trial before the plea: In the early hours of November 17, 2014, defendant left the apartment he sometimes shared with his girlfriend, Angela Radford, in the Hosmer area of Tacoma. RP(6/11) 37; (6/15) 55-56, 79; (6/17) 9. He drove a white Toyota Camry to sell something to "Munchie" at the Crossland Motel, also near Hosmer. RP(6/11) 31, 61-63; (6/15) 79-80, 110-11; (6/17) 12-13. The car belonged to defendant's aunt. RP(6/15) 123-24; Ex. 53. He soon called Radford to get him as he had been robbed by a light-skinned man and a light-skinned woman with red hair. RP(6/15) 80-81. Radford drove him to her apartment. RP(6/11) 23, 35-37; (6/15) 81-82; (6/17) 10-11. The robbery was discussed in the presence of her teenage son, Leilua Samaga. *Id.* All three returned to the motel in Radford's silver Dodge to check the Toyota. RP(6/11) 60; (6/15) 82-83.

Samaga helped defendant transfer property from the Toyota to the Dodge as the Toyota could not be locked on account of the robbers taking its keys. RP(6/15) 83-84; (6/17) 11. The Toyota was left in the parking lot. RP(6/15) 84. They returned to Radford's apartment, where they woke up around 9:00 a.m. RP(6/15) 85-86. Defendant, Radford and Samaga set out in the Dodge to get a spare key for the Toyota. RP(6/15) 87; (6/17) 14. They deviated from the plan upon discovering the Toyota was gone. Radford was driving, defendant was the front passenger, and Samaga sat in back. RP(6/15) 88; (6/17) 15.

They found the Toyota at the nearby American Lodge Motel, also located along the Hosmer corridor. RP(6/15) 88. Three people drove off in the Toyota. RP(6/15) 89. Defendant told Radford to follow. RP(6/15) 90. They pursued the Toyota for a few minutes. RP(6/15) 90; (6/17) 15-16. Samaga saw a light skinned, red-haired, female with two males inside the Toyota. RP(6/17) 16. Somewhere near 82nd street, defendant pulled out a gun and "started shooting at them." RP(6/15) 91-92, 97-98; (6/17) 16. He directed Radford chase the Toyota into an apartment complex. RP(6/15) 93-94; (6/17) 17. A witness woken by gunfire saw people running through the complex, one of whom was a red-haired female; at least two were male. RP(6/15) 133-36. Radford drove back to her apartment. RP(6/15) 94-95. Defendant briefly went inside with Samaga before Radford drove them to a Jack in the Box near the shooting. RP(6/15) 95-96; (6/17) 18.

Police were dispatched to investigate a shooting reported near 80th and Hosmer around 10:00 a.m. RP(6/11) 20, 32. A male was seen in the passenger seat shooting a gun. RP(6/11) 21. One eye witness saw a silver car driving at a high rate of speed as a male in the front passenger seat fired about 5 shots out the window. RP(6/15) 17-20. The rear window was closed. *Id.* Police found the Toyota in the apartment-parking lot. RP(6/11) 33, 60-61; Ex.52. Its most recent occupants were not found; however, a search of the car revealed defendant's license under a floor mat. RP(6/11) 27, 33, 62-64; (6/15) 54-57; Ex.22.

Officer Mills saw the Dodge at Jack in the Box 15 minutes after dispatch. RP(6/11) 21-23; (6/15) 96-97. Radford was driving, defendant remained the front passenger and Samaga was in back. RP(6/11) 23, 35-37. Defendant told Samaga to put the gun in the trunk. RP(6/15) 97; (6/17) 18-19. Samaga pushed it through a port behind his seat. RP(6/17) 19, 97. Defendant directed them not to use his name or talk. RP(6/15) 115. He fled, but was quickly apprehended. RP(6/11) 23-25, 34; (6/15) 98.

Before trial, defendant called Radford about the shooting. RP(6/15) 99. He directed her not to talk to anyone about the case, and asked if she would "take the gun charge." RP(6/15) 99. When she refused, he asked if her son could, reasoning he would not get in much trouble because he was young without prior convictions. RP(6/15) 100. Defendant made similar requests regarding property seized from her apartment, like a bullet proof

vest police found under her bed. RP(6/15) 101, 117. Radford was arrested. RP(6/15) 101-02. Defendant called her in jail. RP(6/15) 31, 33-36, 102; Ex.61. He told her not to talk to prosecutors or her counsel. RP(6/15) 103-04. She nonetheless cooperated with the State. RP(6/15) 104-05.

Police recovered a .40 caliber pistol, a loaded magazine for it, and a loaded .380 caliber handgun from her Dodge.[2] A search of her closet revealed documents linking defendant to the Toyota as well as a box of .40 caliber ammunition.[3] Some matched ammunition in the Dodge. RP(6/11) 74, 83-84. At trial, Radford and Samaga testified about defendant shooting from the Dodge. RP(6/15) 91-92, (6/17) 6, 16. Radford said he fired toward the lead car. RP(6/15) 91-92. Samaga said he shot at the ground or the lead car. RP(6/17) 17. Samaga took responsibility for one of the guns found in his mother's trunk. RP(6/17) 21. Trial was interrupted by the plea right after the direct examination of Samaga. RP(6/17) 23.

Standby counsel presented the plea with stipulation to prior record after a short recess. RP(6/17) 23-24. Counsel helped him prepare the plea documents. *Id.* Defendant had a General Equivalency Diploma. *Id.* at 25. He pled guilty to drive-by shooting and unlawful possession of a firearm in the first degree. *Id.* He acknowledged his rights waiver. *Id.* at 25-26. He

[2] RP(6/11) 27-28, 60-66, 69-73; (6/15) 57; Ex.28, 34, 37-40.
[3] RP(6/11) 36-37, 51-59; (6/15) 56; Ex. 19, 20A-B, 21, 51, 53-55, 64-65.

knew the plea's direct consequences. *Id.*; CP 69. The trial judge asked about the summary of facts making him guilty:

> It says here in paragraph 11 that: On November 17th, 2014, I fired a gun from a moving vehicle creating a substantial risk of death or serious physical injury to individuals in and around the immediate area of the motor vehicle. I was a passenger at the time. I also have a previous conviction for a serious offense and am prohibited from owning or possessing a firearm. All this took place in Pierce County, Washington.
>
> **Mr. Davis is that a correct statement**?

Id. at 29 (emphasis added). Defendant responded: "**Yes, sir**." *Id.* The court then asked: "Is that what happened?" *Id.* at 30. Defendant responded: "It was similar." *Id.* A brief colloquy followed:

> [**Court**:] Sir, let me ask you this, did you fire a gun from a moving vehicle?
>
> [**Defendant**:] Yes, sir.
>
> [**Court**:] Had you had a previous conviction for what is defined as a serious offense under the statute?
>
> [**Defendant**:] Yes, sir.

Id. at 30. The court determined defendant's statements combined with his written plea satisfied the "providency" inquiry for the plea. *Id.* Return of the car referenced at trial was discussed. *Id.* at 31. Defendant read the plea documents. *Id.* Standby counsel read them to him and answered questions. *Id.* at 32. The court accepted the plea, then excused the jury. *Id.* at 33.

At sentencing, the court said the plea was entered when "roughly two thirds of the trial" was complete. *Id.* at 35. Defendant moved to withdraw his plea. His primary basis was disagreement with the appellate-rights waiver executed as part of the plea. RP(6/24) 36. His other grounds were the purported admission of unidentified hearsay, alleged dishonesty by unnamed witnesses and the State's alleged failure to pursue people who robbed him. *Id.* at 37-38. He did not assert the plea lacked a factual basis. *Id.* The court responded by stating:

> Approximately two-thirds of the way through the trial, and I say two-thirds, most of the trial was done, the State and [defendant] entered [] a resolution in which the State eliminated all but two counts [.] [T]he Court [] engaged in [] a thorough providency inquiry with [defendant] to ensure [] he understood the nature and the consequences of the rights he was relinquishing by entering into this plea. And the Court was satisfied, I think the Court continues to be satisfied, [defendant's] [] plea was knowingly, intelligently, and voluntarily rendered. Therefore, the Court respectfully denies his motion to withdraw his guilty plea.

Id. at 39. A 70 month prison term was imposed, partly due to proof he fired a gun from a moving vehicle while chasing a car occupied by people who allegedly robbed him. *Id.* at 40-41.

C. ARGUMENT.

1. DEFENDANT'S UNPRESERVED CHALLENGE TO THE BASIS FOR HIS PLEA TO DRIVE-BY SHOOTING AND UNLAWFUL POSSESSION OF A FIREARM SHOULD BE REJECTED AS HE DID NOT RAISE THAT CLAIM BELOW AND EACH OFFENSE'S ELEMENTS ARE WELL SUPPORTED BY THE RECORD.

"There is a strong public interest in the enforcement of plea agreements when they are voluntarily and intelligently made." ***State v. Codiga***, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). Consistent with that policy, CrR 4.2 only permits defendants to withdraw pleas when necessary to correct manifest injustice. ***State v. Zhao***, 157 Wn.2d 188, 197, 137 P.3d 835 (2006). "This is a demanding standard." *Id.* One that typically cannot be overcome without credible proof the plea was unratified, involuntary, breeched, or the prejudicial product of constitutionally ineffective counsel. *Id.* Denial of a motion to withdraw a plea will not be overturned unless a defendant can prove the decision was an abuse of discretion. *Id.*; ***State v. Easterlin***, 159 Wn.2d 203, 210, 149 P.3d 366 (2006). Discretion is abused if a decision is based on untenable grounds, or the decision is manifestly unreasonable or arbitrary. ***Huff v. Wyman***, 184 Wn.2d 643, 648, 361 P.3d 727 (2015). Unreasonableness is manifest when it is obvious, overt, not obscure, and leads to a view no reasonable court would adopt. *See* ***State v. Taylor***, 83 Wn.2d 594, 598, 521 P.2d 699 (1974); ***State v. Martinez***, 121 Wn.App. 21, 29, 86 P.3d 1210 (2004). Courts cannot abuse discretion by

rendering decisions without regard to issues never raised. ER 103; RAP 2.5; ***State v. Frankenfield***, 112 Wn.App. 472, 475, 49 P.3d 921 (2002).

a. Defendant's unpreserved CrR 4.2 challenge to the factual basis for his plea should not be reviewed as he voluntarily entered the plea midtrial after being identified as the shooter in a retaliatory drive-by.

Courts rightly refuse to review issues raised first on appeal absent manifest error affecting a constitutional right. RAP 2.5(a)(3). The factual basis requirement under CrR 4.2(d) is procedural. ***In re Pers. Restraint Hews***, 108 Wn.2d 579, 591-92, 741 P.2d 983 (1987); ***State v. Zumwalt***, 79 Wn.App. 128-29, 901 P.2d 319 (1995). It is not constitutionally mandated. ***State v. Branch***, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). Adherence to the rule verifies charges are understood, which helps ensure voluntary pleas are entered. ***Hews***, 108 Wn.2d at 591-92; ***Matter of Hilyard***, 39 Wn.App. 723, 727-28, 695 P.2d 596 (1995). Yet voluntariness can be proved through other means. *Id.*; ***Branch***, 129 Wn.2d at 642; ***State v. Holsworth***, 93 Wn.2d 148, 153-57, 607 P.2d 845 (1980).

For a plea to be voluntary, a defendant need only be aware of: (1) the offense(s)' essential elements; (2) the trial rights waiver, *i.e.*, silence, confrontation, and trial by jury; and (3) the direct consequences. *Id.* A knowing rights waiver is proved by advisement and unequivocal waiver. ***State v. Frawley***, 181 Wn.2d 452, 461, 334 P.3d 1022 (2014). Awareness of essential elements can be established through direct or circumstantial

evidence, like proof of familiarity with the charging document. *See* ***Hews***, 108 Wn.2d at 595. Similar exposure to a properly drafted CrR 4.2(g) plea statement can prove the requisite awareness of direct consequences. ***State v. Ross***, 129 Wn.2d 279, 284, 916 P.2d 405 (1996).

Defendant represented himself, so he was bound by all procedural rules, such as the obligation to preserve a challenge to the factual basis attending his plea. ***State v. Smith***, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985); ER 103; RAP 2.5. But he nevertheless failed to raise CrR 4.2(d)'s factual basis rule as part of his motion to withdraw the plea. His written plea combines with the colloquy to prove his awareness of each factor of a voluntary plea; thus, there is no review enabling manifest error implicating a constitutional right. CP 59-69; RP(6/17) 23-33. He does not claim the plea was involuntarily entered; instead, he assigns error to the factual basis he neglected to challenge below.

This is the record of his oral motion to withdraw the plea:

> **[Court]**: Well, this matter came before the court for trial, and [defendant] appeared and we actually I think completed, I suppose, roughly two thirds of the trial, and at that time the [S]tate and [defendant] were able to enter into a resolution of this matter. So at this time, Mr. Davis, I'm going to ask you to share anything you wish for the court to know in regards to this matter or yourself or anything at all that you think is appropriate for the court to know before I impose sentence in this matter. You can proceed, sir.
>
> **[Defendant**:] [P]art of my plea agreement was that I had to give up my right to appeal. And in North Carolina v. Pierce, 395 U.S. 711, a defendant's right to appeal should be free an [sic] unfettered [] unrestricted and unrestrained.

> And I think that this - - I really want to ask the Court to withdraw my guilty plea and enter a plea of not guilty because I contacted the Court of Appeals prior to beginning [sic] of my trial and I have yet to hear a response back from the Court of Appeals. I've even addressed appealing my pretrial motions with Judge Jerry Costello. And with that being said, I ask that you consider withdrawing my guilty plea. And, actually, I think it is not valid on its face and it should be considered null and void. []
>
> [] I do have a motion that I would like entered on the record and also the motion – it is written in a motion, but it is Superior Court Criminal Rule **4.2(f)(1)**, and in the interest of justice, I don't think from these allegations that the interest of justice has been pursued because at my trial there was hearsay allowed. And if these allegations were in fact true, I don't believe that the interest of justice has been pursued because the fact the witnesses against me had dishonesty [sic] and they made allegations that I was robbed. If that weren't true, I still have the question of why didn't the State pursue the robbers. So, your Honor, in the interest of justice, I ask that my withdraw of plea be - - my request to withdraw my guilty plea be granted. Yes, that's all I mean.
>
> I think that my argument has enough merit to withdraw my guilty plea. Also, U.S. Supreme Court [sic] says that a prosecutor is without rights on appeal. So I actually ask that even if the sentencing hearing is continued, that I still reserve my rights to appeal.

RP(6/24) 36-38 (emphasis added). Defendant continued:

> [**Defendant**:] Actually, your Honor, with all due respect, I have to say that I don't feel as if I received justice, and in the interest of justice, I believe that I should be able to withdraw my guilty plea. So with that being said, I would respectfully appeal the decision, your honor. And I want to state my claim of indigency for the record, and I want to ask for court transcripts, stenography reports of each proceeding with my trial, and also Judge Costello's

> courtroom. Because I would like to appeal this decision, and I feel that U.S. Supreme Court ruling [sic] that a plea should be - - I mean, I'm sorry, an appeal should not be – it is the defendant's choice to appeal. And I also would say I would also like you to consider an exceptionally downward [sic] sentence. I think that's – I'm coming at a loss for words, your Honor, so I'm trying to explain myself, but I don't know if you're comprehending exactly what I'm trying to do. But I would not mind asking for an exceptional downward sentence also?

RP(6/24) 40. The motion was denied. *Id.* at 39-42.

Defendant's written motion was consistently captioned: "Motion to Withdraw Guilty Plea pursuant to **CrR 4.2(F)(1)** under ***U.S. v. Couto***, 311 F.3d 179 (2nd Cir) 2002. CP 89(emphasis added). ***Couto***, *abrogated by* ***Padilla v. Kentucky***, 559 U.S. 356, 130 S.Ct. 1473 (2010), reversed denial of a motion to withdraw a plea because a court misunderstood its discretion to evaluate innocence and counsel misstated deportation consequences of the plea. But defendant's motion reiterated disagreement with the appellate-rights wavier attending his plea. CP 90. It cited CrR 4.2(f)(1), but did not articulate a CrR 4.2(d) objection.

Defendant believed the appellate-rights waiver invalidated his plea based on a misreading of ***North Carolina v. Pearce***, 395 U.S. 711, 89 S.Ct. 2072 (1989). That case provides imposition of greater sentences following successful appeals can be vindictive. It does not speak to the validity of waiving appellate rights in pleas. Nothing in defendant's "Memorandum of Law/Facts" nor statement of "Relief Sought" alleged a deficient factual basis. Only the supporting affidavit mentions the colloquy, and only to

claim his incriminating statement was not reliable since it was "an ambiguous expression of qualified guilt coupled with [sic] as statement of facts." CP 88. To him, the record reveals he declared innocence through formalistic recitations of guilt. CP 88. In other words, he allegedly meant the opposite of what he said.

But the credibility of his admission is beside the point, for it raises a different issue from whether there was a factual basis in the record for the plea. "[T]he factual basis [] may come from any source the [] court finds reliable, not just the admissions of [a] defendant." ***State v. Newton***, 87 Wn.2d 363, 371-72, 552 P.2d 682 (1976); ***Zumwalt***, 79 Wn.App. at 130. Defendant did not by impeaching the credibility of his admission preserve a challenge to whether there was adequate proof to support the plea. General objections are inadequate to preserve claims for appeal. ***City of Seattle v. Carnell***, 79 Wn.App. 400, 403, 902 P.2d 186 (1995). Parties are not permitted to argue theories on appeal different from those asserted at trial. *See* ***State v. Mak***, 105 Wn.2d 692, 718-19, 718 P.2d 407 (1986) *abrogated on other grounds by* ***State v. Hill,*** 123 Wn.2d 641, 645, 870 P.2d 313 (1994). Defendant's unpreserved CrR 4.2(d) objection should not be reviewed.

b. Defendant improperly seeks to withdraw a plea to one of two counts he resolved through an indivisible plea agreement.

Criminal defendants are not allowed to withdraw a plea to a subset of counts resolved through an indivisible agreement. ***State v. Chambers***, 176 Wn.2d 573, 581, 293 P.3d 1185 (2013). Pleas are a contract between a defendant and the State. *Id.*; ***State v. Turley,*** 149 Wn.2d 395, 400, 69 P.3d 338 (2003); ***State v. Hardesty,*** 129 Wn.2d 303, 318, 915 P.2d 1080 (1996). They are made indivisible through objectively manifested intent. *Id.* Unexpressed subjective intent will not be considered. *Id.*

Like the indivisible plea in ***Chambers***, the record proves defendant entered an indivisible agreement with the State. Both the challenged plea to drive-by shooting and the unchallenged plea to unlawful possession of a firearm were entered together in exchange for a significant reduction of charges midtrial after two witnesses provided testimony about his motive for the shooting, targets of the shooting, responsibility for the shooting, and possession of the gun used in its commission. Defendant offers no reason why he should be permitted to withdraw his plea to the count for illegally possessing a firearm. Yet that count joins the drive-by shooting count in one indivisible plea. So, his effort to withdraw the drive-by shooting plea should not succeed.

c. A factual basis for the plea is plain in the plea as well as the attending colloquy.

A defendant must prove there was an insufficient factual basis for the trial judge to accept a challenged plea. ***Easterlin***, 159 Wn.2d at 210. "CrR 4.2 does not define what constitutes a factual basis for a plea[.]" ***Zhao***, 157 Wn.2d at 198. Nor does it require the trial court be convinced of a defendant's guilt beyond a reasonable doubt. *Id.* There must only be sufficient evidence from any reliable source for a jury to find guilt. *Id.* To make this finding, a court may consider any reliable information in the record. ***State v. Osborne***, 102 Wn.2d 87, 95-96, 684 P.2d 683 (1984). An acknowledged statement in a written plea admitting conduct supporting conviction for the charged offense(s) can itself provide a sufficient factual basis for a plea. *See* ***Easterlin***, 159 Wn.2d at 210.

Specific-transcribed colloquies are preferred, but not required. ***Zhao***, 157 Wn.2d at 200-01. Written plea statements are *prima facie* proof of voluntariness when their truth is ratified by defendants aware of their terms. CrR 4.2(d). ***State v. Perez***, 33 Wn.App. 258, 261–62, 654 P.2d 708 (1982). Voluntariness is the constitutional concern served by the factual basis rule. When a judge inquires of the defendant and becomes satisfied of voluntariness on the record, the presumption of voluntariness is "well nigh irrefutable." ***Perez***, 33 Wn.App. at 261–62.

Through Paragraph 11, defendant explained his guilt for drive-by shooting and unlawful possession of a firearm:

> On November 17, 2014, I fired a gun from a moving vehicle creating a substantial risk of death or serious physical injury to individuals in and around the immediate area of the motor vehicle. I was a passenger at the time. I also have a previous conviction for a serious offense and am prohibited from owning or possessing a firearm. All this took place in Pierce Co. WA [initialed: J.D.]

CP 67. This paragraph supports each offense. RCW 9A.36.045[4]; RCW 9.41.010(1)(a). Defendant's brief omits reference to the fact he squarely admitted the truth of the paragraph in his colloquy:

> [**Court**:] Mr. Davis, is that a correct statement?
>
> [**Defendant**:] Yes, sir.

RP(6/17) 29; App.Br. at 9. That statement with paragraph 11 meets CrR 4.2(d)'s factual-basis rule. *E.g.*, ***Easterlin***, 159 Wn.2d at 210. For through it he admitted the truth of facts that support both offenses. Only the trial court was able to evaluate the credibility of his statement when made. ***In re Det. of Stout***, 159 Wn.2d 357, 383, 150 P.3d 86 (2007); ***In re Pers. Restraint of Gentry***, 137 Wn.2d 378, 410, 972 P.2d 1250 (1999).

Defendant's brief *curiously* proceeds as if he never acknowledged paragraph 11's accuracy. From that *editing* choice, he presents this exchange as the only relevant colloquy about paragraph 11:

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[4] RCW 9A.36.045(1)—Drive-by shooting: A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge. (2) A person who unlawfully discharges a firearm from a moving vehicle may be inferred to have engaged in reckless conduct, unless the discharge is shown by evidence satisfactory to the trier of fact to have been made without such recklessness. [].

[**Court**:] Is that what happened?

[**Defendant**:] Similar.

[**Court**:] Say again?

[**Defendant**:] It was similar.

[**Court**:] Sir, let me ask you this, did you fire a gun from a moving vehicle?

[**Defendant**:] Yes, sir.

[**Court**:] Had you had a previous conviction for what is defined as a serious offense under the statute?

[**Defendant**:] Yes, sir.

RP(6/24) 30. The court responded:

> All right. I'm going to find that Mr. Davis's comments *as well as what is written down* here satisfy the providency inquiry.

Id. (emphasis added).

But those remarks combine with his acknowledgment of paragraph 11's accuracy to communicate:

> Paragraph 11 is a correct statement that is similar to what happened when the drive-by shooting and unlawful firearm possession it describes occurred; to include the fact I fired a gun from a moving vehicle and had a previous conviction for what is defined as a serious offense.

See CP 67; RP(6/17) 29-30.

Defendant's unqualified use of the word "similar" did not eliminate from the record before the court defendant's unequivocal acknowledgment

of paragraph 11's accuracy. The word does not denote a recantation or contradiction of an antecedent; instead, it means "alike in substance or essentials[.]" Webster's Third New International Dictionary 2120 (2002).

Far from overcoming defendant's burden to prove the factual basis is fatally deficient, the available record supports interpreting his use of the word "similar" to convey paragraph 11, while accurate, was not complete in so much as it was under inclusive by failing to precisely capture every detail of his crimes. Two crimes that consisted of him retaliating against people he said robbed him on his way to make a midnight "sale" to a guy named "Muchie" at a Hosmer motel. He responded by using an illegally possessed handgun to open fire on their moving car from the pursuing car his girlfriend drove with her teenage son in back as both cars raced down a city street amid morning traffic. Once complete, defendant, his girlfriend and her son drove to a nearby Jack in the Box for breakfast. RP(6/11) 20-21, 31-32, 61-63; (6/15) 79-81, 88, 91-92, 95-96, 110-11; (6/17) 12-13, 16, 18. Yet the summary of facts intended for the eight lines in CrR 4.2(g) plea statements need not capture that level of detail.

Defendant's new claim asserts the factual basis is wanting support for the drive-by shooting element that his shooting create substantial risk of death or serious physical injury to another person. App.Br. at 12. But that element is explicitly supported by paragraph 11:

> I fired a gun from a moving vehicle **creating a substantial risk of death or serious physical injury to individuals** in and around the immediate area of the motor vehicle.

CP 67; RP(6/17) 29 (emphasis added). He confirmed this statement's accuracy. *Id.* That admitted fact of creating the required risk to others did not pass into oblivion when he subsequently reiterated his culpability for the shooting and conviction for a serious offense in response to later questions. His confirmation of those facts cannot logically eliminate from the record other admitted facts that were not the subject of additional questions or further comment.

Defendant's assignment of error is most rationally understood as a challenge to the credibility of the factual basis he provided for the drive-by shooting count. His post-hoc argument the unexplained use of "similar" injected ambiguity into paragraph 11 cannot undermine the plea since the factual basis does not need to prove guilt beyond a reasonable doubt. ***Zhao***, 157 Wn.2d at 198. Unequivocal pleas can be valid. ***State v. Pouncey***, 29 Wn.App. 629, 637-38, 630 P.2d 932 (1981). Still, there is no equivocation in defendant's plea. The court was empowered to credit the factual basis in paragraph 11 from his unequivocal acknowledgment of its accuracy. It was not unreasonable for it to disregard his use of "similar" as an immaterial qualification. ***Codiga***, 162 Wn.2d at 923; ***In re Pers. Restraint of Keene***, 95 Wn.2d 203, 204-09, 622 P.2d 360 (1980); ***In re Pers. Restraint of Stoudmire***, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001); ***Perez***, 33 Wn.App. at 261–62. A deficient factual basis has not been proved.

d. Although the factual basis is well-proved by the plea document and attending colloquy, it would be illogical not to consider the trial that terminated through the plea as part of the record supporting the plea.

At a plea hearing, the trial court may consider any reliable source of information in the record to determine if sufficient evidence supports the plea. ***State v. Saas***, 118 Wn.2d 37, 43-44, 820 P.2d 505 (1991); ***Osborne***, 102 Wn.2d at 95. Reviewing courts look to the circumstances surrounding the plea to identify the supporting record. ***Zhao***, 157 Wn.2d at 201. Neither direct evidence nor reference in specific colloquy is required. *Id.*; ***Osborne***, 102 Wn.2d at 96 ("Although the record [] makes no specific mention of the [] affidavit [], numerous references are made to [] statements [] therein").

One must abide a strange legal fiction to consider defendant's plea apart from the trial it interrupted. The plea followed testimony from 13 witnesses. Radford testified he fired a gun out of her car at three people in a lead car she chased down a city street with her teenage son seated behind him. RP(6/15) 89, 91. That testimony supported conviction for the drive-by and firearm offense, as well as the assault counts dismissed in exchange for the plea. CP 51-53. Radford's son then testified defendant shot "towards the ground or the car," the latter version did not support the assault counts. RP(6/17) 17. The plea was presented with the Prosecutor's Statement after that testimony. RP(6/17) 23. The latter document said the amendment was supported by the fact: "A State's witness provided new evidence []

consistent with the amended charges." CP 131. This statement logically referred to testimony Radford's son just provided. Defendant confirmed counsel helped him with the plea papers. RP(6/17) 24. The court referred to the trial while inquiring about defendant's rights' waiver:

> [Court:] You give up as well the right to remain silent before trial, **including today's proceeding, during trial,** and the right to testify []."

RP(6/17) 25 (emphasis added). One of the cars referenced at trial was later referenced as property that might be returned. RP (6/15) 90-91; (6/17) 30-31. Defendant's jury was dismissed after the plea. RP(6/17) 33. That record ends with the note: "(Conclusion of Trial)." RP(6/17) 33.

References to the trial prove it informed the court's understanding of the plea's factual basis. Even without them, common sense would have to be suspended to consider defendant's plea apart from the trial. Pleas are typically accepted in standalone proceedings without sworn testimony to supplement the factual basis. ER 201. Whereas defendant's was accepted midtrial by a judge who heard from 13 witnesses, including two who gave corroborated accounts that he fired an illegally possessed handgun from a moving car in a way that at least met all the elements of drive-by shooting. His convictions should be affirmed.

2. DEFENDANT'S OFFENDER SCORE WAS NOT BASED ON THE OUT-OF-STATE BURGLARY CHALLENGED AS LACKING ADEQUATE PROOF OF COMPARABILITY, SO THERE IS NO MERIT TO THIS ASSIGNMENT OF ERROR.

Absent a multiplier provided for by statute or application of the wash-out rule, offender scores are calculated by adding 1 point for each "other current" offense," 1 point for each prior in-state conviction, and 1 point for each prior out-of-state conviction determined to be comparable to an in-state conviction. RCW 9.94A.525(1), (3), (19); ***State v. Ross***, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). Each type of point can be proved through stipulation; whereby, a defendant affirmatively acknowledges the point is properly included in the offender score. *Id* at 230; ***State v. Hunt***, 128 Wn.App. 535, 542, 116 P.3d 450 (2005).

Defendant's challenge to the comparability of his Louisiana Simple Burglary conviction is moot in that none of the points factored into his stipulated offender score of 7 were derived from that conviction. CP 70-72. The plea was to drive-by shooting and unlawful firearm possession. CP 59. There is no challenge to the award of 1 point to each of those offenses, for each is an "other current" offense as to the other. CP 70. Nor does defendant challenge the 5 points derived from the 5 prior felony convictions for offenses he committed in Washington. CP 71.

Each point awarded appears in the column entitled: "Score by Ct." When a point is awarded, the count to which it is added is designated: "I"

or "II," and the number of points awarded is listed: "1." If no point is awarded, "n/a" appears beside the count. CP 70-71. The abbreviation means "not applicable" or "not available." ***In re C.B.***, 190 Cal.App.4th 102, 146, 117 Cal.Rptr.3d 846 (2010); ER 201. Defendant's 7th point, which he attributes to the Louisiana burglary, facially derives from the unchallenged finding he committed his offenses on community placement:

> [X] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

CP 70. No points were awarded to the Louisiana burglary as shown by the fact "Score by Ct" listed for that conviction is "n/a" as to Count I and "n/a" as to Count II. CP 71. The misdemeanor theft conviction likewise bears the "n/a" designation in the "Score by Ct" column, so it too is not reflected in the score. If one point had been awarded to the burglary as defendant wrongly maintains, his score would be 8. Since a point was not awarded to the burglary, its comparability is irrelevant. There is consequently no need to remand for comparability to be tested. Remand would only be proper if his score was based on the burglary. La.R.S.14:62A; RCW 9A.52.100(1)1; ***State v. Hunley***, 175 Wn.2d 901, 916, 287 P.3d 584 (2012).

3. THE SENTENCING COURT DID NOT IMPOSE UNDULY VAGUE COMMUNITY CUSTODY CONDITIONS THROUGH NOTATIONS IN THE JUDGMENT THAT ALERTED DEFENDANT TO HIS CCO's SUPERVISORY AUTHORITY.

The imposition of sentencing conditions is reviewed for a manifest abuse of discretion. ***State v. Valencia***, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010); ***State v. Bahl***, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008) (plurality opinion). Conditions are not vague when someone of ordinary intelligence could understand the conduct proscribed. *Id.* at 754. Nor do they become vague because one cannot predict with complete certainty the precise point at which actions become prohibited. ***Valencia***, 169 Wn.2d at 793. Pre-enforcement challenges alleging vagueness may only be asserted for the first time on appeal when ripe. ***Bahl***, 164 Wn.2d at 752-537. They are ripe if the underlying issues are primarily legal, factual development is unnecessary and the challenged act is final. *Id.*

Only the judgment's reference to the conditions is ripe for review. RCW 9.94A.704's plain language authorizes CCOs to impose conditions on offenders under supervision, such as requiring offenders to "[r]emain within prescribed geographical boundaries," "participate in rehabilitative programs, otherwise perform affirmative conduct, and to obey all laws." RCW 9.94A.704(3)(b), (4). DOC is ordered to assess the offender's risk of re-offense and establish conditions based on risks to community safety. RCW 9.94A.704(2)(a).

Defendant does not challenge RCW 9.94A.704's constitutionality, or even cite it for that matter. He only asserts the sentencing court imposed unconstitutionally vague conditions by requiring him to:

> [X] remain [] within [] outside of a specified geographical boundary, to wit: per cco.[]
> [X] participate in the following crime-related treatment or counseling services: per cco; [and]
> [X] comply with the following crime-related conditions: per cco.

CP 80. There is no merit to his claim, for the conditions only reiterate the requirement that he follow his CCO's directives within the parameters of RCW 9.94A.704. They alert him to conduct his CCO can regulate. There is nothing patently vague in the terms written, for any reasonable person would appreciate they portend crime-related restrictions related to travel, programs and behavior. They differ from the vague pornography condition in ***State v. Sansone***, 127 Wn.App. 630, 642, 111 P.3d 1251 (2005). For they do not delegate to the CCO unexplained authority touching upon a First Amendment right beyond RCW 9.94A.704's provisions. They are likewise materially different from the sex offense conditions in ***Bahl***, 164 Wn.2d at 758, which enabled regulation not explicitly provided for by statute. Should vague conditions ever be imposed, defendant can seek administrative review. RCW 9.94A.704(6). If the result is unsatisfactory, he can pursue appellate relief. *See* RAP 16.4(c)(6); ***In re Pers. Restraint of Cashaw***, 124 Wn.2d 138, 148, 866 P.2d 8 (1994). The meritless challenge to his community custody conditions should fail.

4. IT WOULD BE IMPROPER TO REVIEW THE UNPRESERVED CLAIM THE TRIAL COURT IMPROPERLY IMPOSED THE MANDATORY $200 CRIMINAL FILING FEE PURSUANT TO DEFENDANT'S PLEA AGREEMENT.

a. Defendant should be bound by the financial conditions of his plea agreement as well as an LFO he failed to challenge below.

Defendants apprised of consequences attending pleas entered into voluntarily, intelligently, and knowingly, must be held to their bargains unless one of four exceptions not before this Court apply. *E.g.*, ***State v. Majors***, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980).

Defendant misidentifies the mandatory $200 filing fee imposed pursuant to RCW 36.18.020(h) as discretionary. If it was discretionary, it would nonetheless be a lawfully bargained for term of his plea that should not be reviewed, particularly given his failure to object to it at sentencing. ***State v. Blazina***, 182 Wn.2d 827, 832-33, 344 P.3d 680 (2015); RAP 2.5(a); RP(6/17) 26-28; (6/24) 34, 40, 42.

b. Defendant misidentifies the mandatory $200 criminal filing fee as a discretionary LFO.

The Legislature divested courts discretion to consider ability to pay when imposing the $200 criminal filing fee mandated in all cases disposed by way of plea. ***State v. Lundy***, 176 Wn.App. 96, 102, 308 P.3d 755 (2013); RCW 36.18.020(2)(h). Defendant's claim it was wrongly imposed in his case without a ***Blazina*** hearing is therefore meritless. CP 77.

5. DEFENDANT'S PREMATURE REQUEST TO PASS COSTS ALONG TO OUR TAXPAYERS SHOULD BE DENIED AS A COST BILL HAS NOT BEEN SUBMITTED AND THERE IS NO INJUSTICE IN A RECIDIVIST CONVICTED OF A DRIVE-BY REPAYING THE PUBLIC FOR HIS APPEAL.

a. Defendant's objection should await a bill.

Review of appellate costs should await an objection to a bill. RAP 14.4-14.5; ***State v. Sinclair***, 192 Wn.App. 380, 389-90, 367 P.3d 612 (2016); ***State v. Caver***, 195 Wn.App. 774, 784-86, 381 P.3d 191 (2016); ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000); ***State v. Blank***, 131 Wn.2d 230, 243-44, 930 P.2d 1213 (1997). Defendant should not be preemptively insulated from repaying the public for his appeal.

b. Money defendant receives would be well directed to repayment of costs advanced by taxpayers.

RCW 10.73.160(1) authorizes the imposition of appellate costs. Imposition of costs has been historically considered an appropriate means of ensuring able-bodied offenders "repay society for [] what it lost as a result of [their] crime." ***State v. Barklind***, 87 Wn.2d 814, 820, 557 P.2d 314 (1976). This community-centric concept of restorative justice has been recently subordinated to an offender-centric concern for difficulties anticipated to attend repayment. ***Blazina***, 182 Wn.2d at 835-37. Ability to pay is not an indispensable concern. ***Sinclair***, 192 Wn.App. at 389.

Defendant revealed himself able enough to deliver drugs to folks with monikers like "Muchie" in the middle of the night as well as shoot at rivals from a moving car. Directing any money he earns to repaying the public for costs it incurred on his behalf is far more just than shifting them to hardworking taxpayers, who rarely if ever avail themselves of judicial resources recidivists like defendant so regularly consume.

D. CONCLUSION.

Defendant's unpreserved challenge to the factual basis supporting the drive-by shooting count in his two count indivisible plea should not be reviewed. If reviewed, it should fail as the factual basis supports each element of that offense. Remand to address the comparability of his prior Louisiana burglary is unwarranted, for it was not included in defendant's offender score. And the challenged conditions of his community custody are not unconstitutionally vague as they alert him to definite-supervisory authority provided for by statute. He should not be permitted to challenge

the mandatory $200 fee imposed at sentencing. And appellate costs should not be addressed or preemptively passed along to taxpayers.

RESPECTFULLY SUBMITTED JANUARY 13, 2017

MARK LINDQUIST
Pierce County
Prosecuting Attorney

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Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/13/17
Date Signature

PIERCE COUNTY PROSECUTOR

January 13, 2017 - 3:14 PM

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